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SUPREME COURT, U.S.

No. 07-717

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

LORENA MINIX, BRENDA SIMS, and LINDA SIMS,

PETITIONERS,

v.

JELD-WEN, INC.,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Reply to Respondent's Brief in Opposition

Respondent's brief in opposition begins by attempting to minimize the authority of Joe Mendoza, the coordinating group manager at the facility in question, who received a report of severe sexual harassment by the perpetrator in this case, Richard Fetner, against a female employee, Kathy Thornton, which preceded the harassment of Petitioners. Mendoza, a management employee of Respondent for fifteen years, took no action after being placed on notice of Fetner's harassment. Mendoza admitted that he was required to take action when given a report of sexual harassment. (See Petition pp. 7-8).

Respondent devotes a half page footnote to argue that the Petitioners have "misconstrued" Mendoza's responsibilities, after receiving a report of harassment. However, courts are required to view the evidence in its light most favorable to the Petitioners. The Petitioners used the sworn testimony of Mendoza, himself, to establish his duties, which he failed to fulfill, after receiving the report of harassment from Ms. Thornton.

Moreover, a jury should be permitted to view the evidence under the totality of circumstances to determine if Respondent was negligent in permitting the harassment of Petitioners to occur, rather than exclusively analyzing the case under the Respondent's anti-harassment policy, which is only relevant, under the Faragher/Ellerth defense, for a

determination of vicarious liability, not direct liability based on the employer's negligence.

Respondent contends that Petitioners argue that a report of harassment to any supervisor should establish notice of the alleged conduct. (See Respondent's brief, p. 5). On the contrary, Petitioners argue that a report of harassment to one of only two management employees at the facility, when the other management employee is the perpetrator, coupled with the testimony of said management employee that he is trained to act on complaints, and failed to do so, is sufficient evidence for a jury to conclude that the notice requirement has been met under this Honorable Court's holding in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and its progeny. Mendoza's supervisory position is similar to the ones held by the persons in the cases cited by Petitioners from other circuits which embrace the legal theory embodied by Meritor and advanced by Petitioners.

Respondent's attempt to dispute the clear conflict between the circuits in determining whether an employer has notice of unlawful harassment is wholly unpersuasive. Notwithstanding Respondent's contention to the contrary, the Eleventh Circuit could not have been clearer that an anti-harassment policy, alone, determines whether notice has been proven by a harassed employee. The Eleventh Circuit held, "when an employer promulgates an adequate and reasonable anti-harassment policy, the employer 'itself answers the question of when it is deemed to

have notice.'" (See Appendix, p. 8a, quoting Coates v. Sundor Brands, Inc, 164 F.3d 1361, 1364 (11th Cir. 1999). Unfortunately, the Eighth Circuit followed the reasoning in this case, regarding this very issue of law in Weger v. City of Ladue, __F.3d__, 2007 WL 2669425 8th Cir. 2007).

This line of reasoning ignores the fact that this Court's decisions in Faragher and Ellerth extended employer liability to include vicarious liability, under certain circumstances; it did not intend to limit establishing employer liability, based on its failure to act after being placed on notice that harassment exists. See Burlington Industries, Inc, v. Ellerth 524 U.S. 742, 759 (1998). To allow the employer to escape liability, based on its own negligence, by defining the terms upon which it can be held responsible, transforms the Faragher/Ellerth affirmative defense from a shield against vicarious liability to a sword to arbitrarily defeat direct liability.

Respondent's attempt to distinguish this case, with the cases cited in the petition, from the Fourth, Sixth, Seventh, and Tenth Circuits is also unpersuasive. Although no two cases are factually identical, Respondent concedes, as it must, that these circuits, unlike the Eleventh and Eighth circuits, properly hold that direct liability can be established, even if the harassed employee does not follow an anti-harassment policy, if the totality of circumstances demonstrate negligence by the

employer in failing to remedy harassment, after being placed on notice of same.

The cases cited in the petition from the Sixth, Seventh, and Tenth Circuits all found that notice was demonstrated, to establish direct liability by the employer, when a supervisor, at the place of employment where the harassment occurred, was told or knew of the harassment and failed to take remedial action. (See Erickson v. Wisconsin Department of Corrections, 469 F.3d 600 (7th Cir. 2006), Curran v. AMI Fireplace Company, Inc., 163 Fed. Appx. 714 (10th Cir. 2006), Randolph v. Ohio Department of Youth Services, 453 F.3d 724 (6th Cir. 2006).

That is precisely what occurred in this case. It is both logical and just to allow a harassed employee to satisfy the notice requirement when they demonstrate a report of harassment to management employees, on site, who have been trained, like Joe Mendoza, to act on the report.

The similarities to the case sub judice and the ones cited in the petition are the reason Respondent attempts to minimize the authority and responsibility of Mendoza. It seeks to confine employer liability, based on the employer's own negligence, to terms which the employer, alone, can define. This concept is anathema to negligence, which uses the reasonable person objective standard to determine if liability exists, not the subjective pronouncements of one of the parties.

The only way to resolve this conflict between the circuits is for this Honorable Court to grant the petition and reaffirm its holdings in Meritor, Faragher, and Ellerth that an employer can be held liable for supervisor sexual harassment, should a plaintiff demonstrate that the employer was negligent is failing to remedy harassment it had notice of, notwithstanding the existence of, or the adherence to, an anti-harassment policy.

Lastly, the Respondent's contention that the Eleventh Circuit's ruling leaves room for constructive notice to be used as a mechanism to establish employer liability, when an anti-harassment policy exists, is also without merit. Respondent is correct that Eleventh Circuit law allows constructive notice to be used when an anti-harassment policy is deemed ineffective. (See Watson v. Blue Circle, Inc., 324 F.3d 1252,1259-1261 (11th Cir. 2003). However, this analysis misses the point.

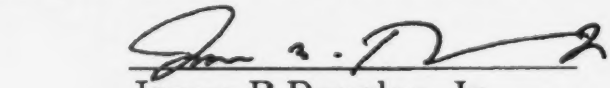
This Honorable Court, as stated before, used the Faragher and Ellerth decisions to expand employer liability in Title VII sexual harassment cases. Under the Meritor decision, which was specifically upheld as to constructive notice by Faragher and Ellerth, an employer is liable for sexual harassment it should have known about and failed to correct. If an employer can escape that liability, simply by having an anti-harassment policy, effective or not, then liability, based on constructive notice, has effectively been abrogated by the mere existence of the policy.

In short, an employer should be held liable when it has constructive notice of the harassment and fails to remedy it. Although the facts of this case clearly establish constructive notice, due to the pervasive and wide-spread nature of the harassment, the Eleventh Circuit failed to even analyze the question because it never moved beyond the anti-harassment policy, which is not an affirmative defense to employer liability based on the fact that an employer has constructive notice of unlawful harassment and fails to take action. Again, the only way to remedy this degradation of constructive notice employer liability is for this Honorable Court to grant the petition and reaffirm its long-standing holdings regarding it.

CONCLUSION

Based on the forgoing, petitioners respectfully request that this Honorable Court grant the writ of certiorari and reverse the Judgment of the Eleventh Circuit.

Respectfully submitted this 10th day of January, 2008.



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